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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BHAKTIVEDANATA BOOK TRUST  
INTERNATIONAL, INC., et al.,

Plaintiffs and Respondents,

v.

INTERNATIONAL SOCIETY FOR  
KRISHNA CONSCIOUSNESS, INC.,

Objector and Appellant.

B209982

(Los Angeles County  
Super. Ct. No. BC170617)

APPEAL from a judgment of the Superior Court of Los Angeles County.

John P. Shook, Judge. Vacated and remanded.

Chittur & Associates and Krishan S. Chittur; Luce, Forward, Hamilton &  
Scripps and Jefferey D. Wexler for Objector and Appellant.

Law Office of David M. Liberman and David M. Liberman; Jeffers,  
Mangels, Butler & Marmaro, Neil C. Erickson and Joshua Hodas; Law Offices of Joseph  
Fedorowsky and Joseph Fedorowsky; Law Offices of Robert C. Moest and Robert C.  
Moest for Plaintiffs and Respondents Bhaktivendanta Book Trust International, Inc,  
International Society of Krishna Consciousness of California, Inc., and Veda Guhya Das.

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International Society for Krishna Consciousness, Inc. (ISKCON) appeals from the court order denying its motion to unseal a superior court record that had been ordered sealed by the superior court in 1998 as a part of the settlement and judgment in a lawsuit involving respondents Bhaktivendata Book Trust International, Inc. (BBTI) and the International Society of Krishna Consciousness of California, Inc. (ISKCON of CA) and several other individuals. Appellant argues that the court abused its discretion in denying the motion to unseal because the court did not make the required determinations under California Rules of Court, rule 2.550. Moreover, appellant argues that the lower court's refusal to unseal the record was improper because: (1) documents cannot be sealed under California Rules of Court, rules 2.550-2.551 based solely on parties' stipulation; (2) respondent did not identify the overriding interests to justify continued sealing; and (3) some of the documents under seal had already been filed publicly. Alternatively, appellant argues that the court abused its discretion when it refused to determine which documents or categories should remain under seal and by not allowing appellant to have access to sealed documents under appropriate conditions. Lastly, appellant contends that the court improperly expanded the 1998 sealing order to include additional documents that were outside the original court file. For the reasons set forth below, we reverse.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

#### **The 1998 Litigation, Stipulation and Judgment.**

In the late 1990s, respondents sued Hans Kary for copyright violations while Mr. Kary, Veda Guhya Das, and Diane Marie Chain filed cross-complaints. After 18 months of litigation, the parties stipulated to a settlement agreement. On November 13, 1998, the stipulation was filed and the lower court, in accord with the stipulation, ordered that the court file be sealed. The judgment provided: "[t]he Court file, with the exception of this Stipulated Judgment, is to be sealed and remain confidential." The stipulation indicated that the Bhaktivedanta Book Trust (BBT) was the owner of the intellectual property rights at issue in the litigation as set forth in Attachment A of the settlement agreement.

The agreement also named certain individuals as BBT's trustees. (Here collectively known as the 1998 California Case.)

### **The New York Litigation.**

Appellant is currently a plaintiff in a New York lawsuit along with the Governing Body Commission of the International Society for Krishna Consciousness. In the New York case, appellant alleges that the defendants in the case had unlawfully asserted control over real property that belonged to appellant. In the New York litigation, appellant sought to discover and use some documents. However, a discovery referee in the New York litigation found that many of the documents that appellant sought to discover may have been placed under seal in the 1998 California Case. The referee ruled “[i]t is the finding of this court that the documents which have been sealed by the California Court to the extent that the defendant is seeking said documents, his remedy lies with an application before the judge in California who presided over that case, who sealed the records in that case.”

### **Litigation resulting in this appeal.**

Appellant filed a motion in the 1998 California case to unseal the court's record and/or to clarify the 1998 sealing order. Respondents BBTI opposed the motion.<sup>1</sup> The lower court denied the motion to unseal the record. The court stated:

“I don't remember all of the details, but I remember talking to counsel in chambers, and I thought that the reasons for putting it on the record --- for sealing the record were pretty clear. To me, as I recall, there was a pretty critical issue. The very reason they wanted it to be sealed was to effectuate the settlement itself. . . . In any event, the other reasons were to – for protection of property rights and various trade secrets and some privileged information that went forward. [¶] . . . Everybody wanted a confidential settlement because there was a concern for embarrassment to some of the litigants. And, again, for the purposes to effectuate the settlement itself.”

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<sup>1</sup> Hans Kary and Dianne Marie Chan, defendants in 1998 California Litigation, supported the motion to unseal the record.

With respect to appellant's request to clarify the sealing order, the lower court initially observed "[n]ow, to me, that would encompass the settlement agreement itself for sure and anything that is in the court file. In my opinion it would not cover anything outside of the court file. Any documents that either side has – Mr. Kary, for example, who is opposed to – who is in favor of lifting the seal, but certainly anything in the court file was sealed, and the terms of the settlement were sealed." However, by the end of hearing, the court stated "I think [the sealing order] applies to – after considering it, I think it applies to any and all documents that are connected with this litigation, legal pleadings, deposition transcripts, motions for production of documents, the documents that were produced pursuant to motions, responses to interrogatories, any court rulings that were made in connection with the case, all of that."

This appeal followed.

### ***DISCUSSION***

Appellant raises several issues on appeal. First, appellant argues that the lower court abused its discretion when it neglected to make the required findings under California Rules of Court, rules 2.550-2.551 when it denied the request to unseal the court's file of the 1998 California Case. Second, appellant argues that the trial court erred when it concluded the record could remain sealed based on the stipulation of the parties in the 1998 judgment. Appellant argues that the respondents failed to demonstrate any "overriding interest" to justify continued sealing. Third, appellant contends that the trial court also erred when it refused to allow appellant to access the documents under appropriate conditions or subject to certain limitations. Finally, appellant asserts the court improperly expanded the prior sealing to include other documents that had not previously been in the court file in 1998.

#### **Relevant Legal Principles.**

A motion to unseal court records is governed by California Rules of Court, rule 2.551(h), which provides that a "sealed" record can only be unsealed upon the order of the court. Additionally, any person can move, apply or petition to unseal any court

record. In determining whether to unseal a record the court is required to consider the elements outlined in rule 2.550(c)-(e). (Cal. Rules of Court, rule 2551(h)(4).) Rule 2.550(c) states that “unless confidentiality is required by law, court records are presumed to be open.” Rule 2.550(d) lays out the express factual findings required before a court can seal or unseal the court records: “(1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest that overcomes the right of public access to the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest.” Section (e) of California Rules of Court, rule 2.550 states that an order sealing the record must: “(A) Specifically state the facts supporting the findings; and (B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.”

The party that is seeking to seal a court record or to maintain a previously sealed record has the burden of proof under rule 2.550. (See *H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894.) In *H.B Fuller Co. v. Doe*, the court observed that the determination to seal or *unseal* a record cannot be made without balancing the competing interests and concerns. Since the party that is seeking to seal the documents or seeking to keep the documents sealed is in the “best position to know what disclosures will harm him and how,” the burden to provide information about countervailing secrecy interest is on that party. (*Ibid.*) With these concepts in mind, we turn to appellant’s contentions.

### **Appellant’s Contentions.**

Before addressing appellant’s specific claims as to the application of rule 2.550, we note that based on the transcript of the hearing at which the lower court considered the motion to unseal the court record, it appears that the court misallocated the burden of

proof and persuasion on the motion to appellant. The court stated: “I don’t think that there is sufficient evidence presented by the moving party [appellant] in this motion for this court to rewrite the agreement of the parties or vacating the agreement of breaching the agreement in some fashion.” However, as the court in *H.B. Fuller Co.* explained, under rule 2.550 court records are presumed “open” and the burden to demonstrate that sealing of records is warranted, or in this case that they should remain under seal, falls upon the party, here respondents, seeking to maintain the seal. (See *H.B. Fuller Co. v. Doe, supra*, 151 Cal.App.4th at p. 894.) However, the lower court’s misallocation of the burden effectively relieved respondents of presenting sufficient evidence or convincing argument in defense of the order to seal the court’s file. As result, the record developed below is simply inadequate to support the lower court’s exercise of discretion in ruling on appellant’s request.

**A. Respondents failed to make specific showing under rules 2.551 and 2.550 necessary to show that the documents in the Court’s file should remain under seal.**

**1. Overriding interests.**

Before this court, respondents assert several “overriding interests” to keep the records in this case sealed, including: (1) to facilitate the settlement of the 1998 California Case; (2) the preservation of trade secrets and copyrights; (3) attorney-client privilege concerns; (4) the desire to avoid potential embarrassment; (5) the existence of a trust organization; and (6) First Amendment Establishment clause issues. However, based on the record before this court, it does not appear that respondents demonstrated below that any of these grounds constituted an “overriding interest” that would outweigh disclosure in this case.

*a. Settlement Concerns in the 1998 California Case.*

Respondents argue that the primary overriding interest to maintain the seal on court records is the settlement of 1998 California Case, which flowed from the parties’ stipulation to the judgment and to seal the records. Indeed, the desire to protect the

settlement was the chief reason cited by the court in denying appellant's motion to unseal. However, after *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999)20 Cal.4th 1178, and the implementation of California Rules of Court, rules 2.550 and 2.551, it has become clear that a court can no longer order a record sealed or order that a record remain under seal based solely on the parties' stipulation to seal the record. (Cal. Rules of Court, rule 2.551(a); *H.B. Fuller Co., supra*, 151 Cal.App.4th at p. 891 [Sealing order could not stand based on parties' stipulation where the "trial court never found, and had no factual basis to find any facts supporting the sealing order"]; *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 600 [Court held that lower court could not have sealed documents without Wal-Mart filing a motion to seal under rule 2.550 based simply on the parties' agreement or stipulation.].) It follows then, that parties cannot obtain an order to seal a court file by requiring it as a condition of settlement and stipulation to the entry of judgment. The fact that the parties agreed to have the record sealed does not relieve the party from demonstrating it has satisfied the requirements under California Rules of Court, rules 2.550 and 2.551. (See *Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.* (3d Cir. 1986) 800 F.2d 339 [The court held that the generalized interest of encouraging settlement agreements does not rise to the level of interest to outweigh public access; the party must show particularized interest in continued secrecy.].) As such, here the parties' stipulation to seal the court record in 1998 is not a sufficient overriding interest to justify an order to maintain the seal.

Respondents suggest, however, that the stipulation to seal the court record in the 1998 California Case gave rise to a "contractual obligation" which required parties to not disclose the documents currently under seal and that such a contractual obligation constitutes an "overriding interest" under the Rules of Court. Courts have, under certain circumstances, recognized "contractual obligations" as an overriding interest to support a sealing order. (*Publicker Indus., Inv. v. Cohen* (1984) 733 F.2d 1059, 1073-1074 [the court noted that a party can overcome the presumption of openness "where there is a binding contractual obligation not to disclose certain information"].) Nonetheless, courts

have also recognized that mere agreement between parties is not enough to seal court records and the parties must show some serious injury that would occur absent a sealing order. (*Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1282.) In *Universal City Studios, Inc.*, the court noted that contractual obligation to not reveal certain information to protect “business interests” could be an overriding interest; however since the defendant did not show how revealing the settlement agreement would hurt business interests, the court concluded that the party seeking the sealing order did not meet the burden required to seal the documents. (*Id.* at p. 1284.)

Here the case differs from cases where a contractual obligation has been found to serve as an overriding interest. In cases, such as *Universal*, where sealing was found appropriate, the contractual obligation was separate from and arose before the sealing order was sought. But here, the contractual obligation is itself the agreement to seal the documents. On the record before this court it does not appear that respondents had any separate business interest underlying the contractual obligation other than the desire of the parties in the 1998 litigation to settle the case and their desire for secrecy. Neither of these interests qualifies as “overriding interests” that California Rules of Court, rules 2.550 and 2.551, are meant to protect.

*b. Other grounds Cited to Justify the Sealing Order.*

**i. Grounds raised in the lower court.**

Respondents also assert that the court records should remain under seal because the court file from the 1998 California Case contains documents: (1) relating to trade secrets and intellectual property; (2) subject to attorney-client privilege; (3) that contain embarrassing information, and (4) that involve a trust organization. While the court at the hearing indicated it remembered these other grounds, the court did not state it was relying upon them in denying the motion to unseal the record. Indeed, in view of the record developed in the lower court on these issues, any reliance upon these additional grounds would be an abuse of discretion. None of these other reasons were specifically argued below or were sufficiently supported by specific evidence.



**Trade Secrets and Intellectual Property Rights.** Courts have recognized trade secrets as a potential overriding interest for restricting public access to information. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292.) However, a trade secret does not in itself require confidentiality as required by law unless the action is initiated pursuant to the Uniform Trade Secret Act. (*Id.* at p. 288.) Since that is not the case here, the law does not require the confidentiality of the alleged trade secrets. As such, we look to see whether there is an overriding interest in protecting the alleged trade secrets. The Legislature has defined a trade secret as “information, including a formula, pattern, compilation, program, device, method, technique, or process that: [¶] (1) Derives independent economic value, . . . from its disclosure or use; and [¶] (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” (Civ. Code, § 3426.1, subd. (d).) Here, the respondents did not identify the trade secrets at issue, nor did they identify any prior efforts to maintain the secrecy of the alleged trade secrets. All of the documents purportedly containing trade secrets were disclosed publicly when they were originally filed in the court’s record during the litigation of the 1998 California Case. As in *In re Providian*, where the court held that certain scripts were not trade secrets because they had been exposed to the public, here it appears that the alleged “trade secrets” were for 18 months prior to the settlement of this case available to the public in the court files. (*In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 305.)

In addition to trade secrets, respondents also claim that they have copyright ownership to the documents in the sealed court file. While they may or may not have such ownership rights is beside the point and is not a reason to keep the documents under seal. Respondents have not demonstrated how unsealing the court’s file would have any effect on the copyrights they claim to own.

**Attorney-Client Privilege.** Respondents also claim that the information at issue should remain under seal because it is subject to the attorney-client privilege. Evidence Code section 954 states that a person can refuse to disclose information or prevent

another from disclosing communication that was confidential between attorney and client. This privilege is subject to Evidence Code section 912, subdivision (a) which states that the privilege “is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone.” Here, as mentioned elsewhere, respondents have not identified which documents would be subject to the privilege. Any documents previously included in the open court files would likely no longer be subject to the privilege in any event.

**Potential Embarrassment.** The disclosure of documents that contain potentially embarrassing information may constitute an overriding interest in some situations. (*Universal City Studios, Inc., supra*, 110 Cal.App.4th at p. 1281.) This is especially true in cases where for example non-disclosure is required to prevent a victim of a sex crime from future trauma and embarrassment. (*Ibid.*) On this record, however, respondents have failed to identify any serious potential for embarrassment to anyone. Respondents’ claim of potential embarrassment is further suspect given that for 18 months these documents were open to the public during the pendency of the 1998 California Case. Even if the respondents could, they have failed to present a convincing argument that the information in those files would still be a source of embarrassment more than a decade later.

**Trust Organization.** Respondents assert that since this case involves a trust, that in itself is an overriding interest to keep the record sealed. However, there was no evidence that this ground was considered by the court when the court file was originally sealed in 1998. Additionally, although appellant and respondents bring up the issue of whether the existence of a public trust is an overriding interest, the court did not discuss this issue in denying the motion to unseal the records. As such, the “trust” argument cannot be grounds to support the court’s order.

**ii. Other Grounds raised for the first time on appeal.**

Although respondents claim that the court relied upon the protection of religious rights and the establishment of religion in support of its order, the lower court did not cite these reasons to justify the order nor is there any evidence that such grounds were considered by the court. Moreover, the issue of entanglement in religion, i.e., the right of religious organizations to act without government interference, was never cited as a basis to justify the sealing order in the 1998 California Case. Indeed, respondents used the secular court processes and causes of action to pursue the 1998 litigation so they cannot be heard now to complain that the issues resolved in 1998 in the California Courts were so linked to the church's inner-workings that the Establishment Clause prevents the court from opening its own record and files of those proceedings now. Thus, respondents waived the right to claim religious entanglement as a justification to keep the court records sealed. It does not appear based on this record that the motion to unseal the court file implicates issues of religious freedom under the First Amendment. Respondents simply did not show such affects of unsealing the record rise to the level of improper entanglement.

**2. Prejudice.**

Under California Rules of Court, rule 2.550d(3), respondents were required to specifically show that their interests would be prejudiced if the court file was unsealed.

Even assuming respondents have shown an overriding interest, there was no showing of prejudice to that interest under California Rules of Court, rule 2.550. As explained elsewhere, the documents at issue had been publicly filed and disseminated. Respondents have not articulated how, more than ten years after the record was sealed, the opening of the court file would harm their interests. They presented no evidence that the unsealing of the record would unravel the 1998 settlement or that any of the original reasons that may have existed for sealing the record would be prejudiced at this point.

### **3. Scope of the Order.**

Notwithstanding the foregoing analysis, the court also erred in failing to require that respondents demonstrate the need to keep sealed each individual document in the court file. (See *Universal City Studios, Inc.*, *supra*, 110 Cal.App.4th at p. 1286 [sealing of some documents would be narrowly tailored because the documents related only to the overriding financial interests].) This case involves a blanket order to seal all documents in the court file and in maintaining that order it appears that the court failed to consider whether appellant (who alleges it is the sole beneficiary of the BBT) should be allowed to have limited access to certain documents under certain conditions. The court also erred in failing to consider whether limited access for appellant might be appropriate under California Rules of Court, rule 2.551(h5), which allow the court discretion to allow some entities (rather than full public disclosure) to view the documents.

#### **B. The Court Erred In Expanding The Original Sealing Order.**

In denying appellant's motion the court ruled that "I think it applies to – after considering it, I think it applies to any and all documents that are connected with this litigation, legal pleadings, deposition transcripts, motions for production of documents, the documents that were produced pursuant to motions, responses to interrogatories, any court rulings that were made in connection to the case, all of that." The court's expansive order is contrary to the law. The sealing rules only apply to items in the court file.<sup>2</sup> (See Cal. Rules of Court, rule 2.550(3).) By its own terms the original sealing order only applied to the documents in the court file, and not other documents. Moreover, sealing orders cannot apply to discovery documents that are not used at trial or are not a part of the court's file as exhibits to dispositive motions; therefore documents that are part of the

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<sup>2</sup> To maintain the confidentiality of documents outside the court file, in general, a party can seek a protective order. (See *Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882, 895.) Here, it does not appear the parties ever sought a protective order.

file in connection with discovery motions are not subject to being sealed under the Rules of Court. (See *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 101.)

In view of all of the foregoing, we conclude the lower court erred in ruling on appellant's motion to unseal the court file of the 1998 California Case.

### ***DISPOSITION***

The order denying the motion to unseal the superior court record is vacated and this matter is remanded to the superior court for further proceedings. On remand, the superior court is directed to reconsider the motion and conduct a new hearing on the matter in light of the California Rules of Court and the views expressed in this opinion to determine whether the motion should be granted. Appellant is awarded costs on appeal.

**WOODS, Acting P. J.**

**We concur:**

**ZELON, J.**

**JACKSON, J.**